BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MARION A. GREGG)

Appearances:

For Appellant: Winthrop O. Gordon
Attorney at Law

For Respondent: Lawrence C. Counts
Assistant Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Marion A. Gregg against a proposed assessment of additional personal income tax and penalty in the total amount of $463.91 for the year 1960. The penalty amounted to $92.78 and was imposed for failure to file a timely return. However, respondent Franchise Tax Board has conceded the penalty issue.

In March 1954 appellant was granted a divorce from her husband and custody of their only child. The interlocutory decree provided:

> It is further ordered that defendant pay for the care and support of plaintiff and said minor child the sum of Two Hundred Twenty-five ($225.00) Dollars a month, commencing as of the 15th day of January, 1954, and on the 15th day of each and every month thereafter, and until said minor child becomes self-supporting, marries, becomes of age, or dies, at which time all payments whatsoever from husband to wife shall cease.

However, no payments were received by appellant from her husband until April 1960 when appellant accepted $14,422.50 as a release for delinquent payments. The following language appeared on the reverse side of the canceled check:

> Acceptance of the sum indicated on the face of this check, together with endorsement hereon by payees constitutes acknowledgement of full satisfaction of all sums due for child support and alimony ....

During 1960 the husband subsequently disbursed an additional $1,350 to appellant.

Appellant assumed that the amounts paid were not taxable to her, and inasmuch as appellant's other income was not sufficient, in and of itself, to result in personal income tax liability for 1960, appellant did not file a timely 1960 personal income tax return. Respondent considered the amount as alimony taxable to the wife and issued the proposed assessment

The issue presented is whether the amount paid by the ex-husband to appellant in 1960 is to be regarded as alimony taxable to appellant or as child support money which was not taxable to her.

Section 17081, subdivision (a), of the Revenue and Taxation Code provides in part:

> If a wife is divorced ... from her husband under a decree of divorce ..., the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of ... a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce ....
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> Section 17082 provides in part:
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> Section 17081 shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband.

During the taxable year the aforementioned statutory provisions were similar in all respects to their federal statutory counterparts, sections 71(a)(1) and 71(b) of the Internal Revenue Code of 1954.

Under the comparable federal law, unless the decree providing for the periodic payments specifically states the amounts or parts thereof allocable to the support of the child, the entire amount is regarded as alimony taxable to the wife. Allocations to child support may not be left to determination by inference. (Commissioner v. Lester, 366 U.S. 299 [6 L. Ed. 2d 306]. See also Weil v. Commissioner, 240 F.2d 584 and Florence C. Thomson, T.C. Memo., Dkt. No. 2554-64, March 28, 1966.)

Furthermore, the receipt of arrearages of alimony paid by the husband in a lump sum constitutes the receipt of a periodic payment includible in full in the gross income of the recipient in the year in which it is received. (Estate of Sarah L. Narischkine, 14 T.C. 1128, aff'd, 189 F.2d 257; Elsie B. Gale, 13 T.C. 661, aff'd, 191 F.2d 79.)

Appellant's principal contention is that the Lester case, supra, decided May 22, 1961, represented a change in the decisional law and should not be applied retroactively. She points out that as of April 15, 1961, the date her tax was due and payable, the Ninth Circuit Court of Appeals did not require a specific statement in the decree of the amount or part of child support in order for the wife to exclude the amount from her income for federal tax purposes. (Eisinger v. Commissioner, 250 F.2d 303.) She also cites Linkletter v. Walker, 381 U.S. 618 [14 L. Ed. 2d 601], in which the Court held that a decision which it made, overruling an earlier decision by it regarding the admissibility of evidence, should not be applied to criminal convictions that had become final in reliance on the earlier decision.

Generally, when a court of last resort overrules one of its earlier decisions it gives the new decision retroactive effect. (County of Los Angeles v. Faus, 48 Cal. 2d 672 [312 P.2d 680]; Massaglia v. Commissioner, 286 F.2d 258; Sunray Oil Co. v. Commissioner, 147 F.2d 962, cert. denied, 325 U.S. 861 [89 L. Ed. 1982].) The court may, however, apply the new decision prospectively only, based on considerations of justifiable reliance, substantial hardship, or avoidance of disruption in the administration of justice. (Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 [77 L. Ed. 360]; Linkletter v. Walker, supra; Note 14 L. Ed. 2d 992.)

There are a number of considerations that lead us to decide this matter on the basis of the Lester case, without regard to the date of that case: (1) we are not in the position of a court of last resort overruling one of its earlier decisions; (2) we have previously cited the Lester case as authority with respect to a taxable year predating that case (Appeal of Leslie A. Spivak, Cal. St. Bd. of Equal., March 17, 1964); and (3) the Eisinger decision was not a decision by a court of last resort nor did it stand unopposed prior to 1961. (See Deitsch v. Commissioner, 249 F.2d 534, and the lower court decision in the Lester case at 279 F.2d 354.) The decision by the United States Supreme Court in the Lester case, moreover, has been applied retroactively by other federal courts. (Florence C. Thomson, supra, T.C. Memo., Dkt. No. 2554-64, March 28, 1966.)

Appellant also cites Hunter v. Hunter, 170 Cal. App. 2d 576 [339 P.2d 247] as authority for the proposition that the lump sum payment constituted child support money and not alimony. We do not believe, however, that the Hunter case applies here. In that case a divorced wife was held barred from recovering child support money from her ex-husband because she had entered into an agreement releasing him from child support payments specified in the divorce decree. The court indicated that she was attempting to recover, not funds for current support of the children, but reimbursement for funds she had already spent for their support. The Hunter case did not involve the interpretation of section 17081 or any other tax statute and, furthermore, the amount of child support in that case was specifically designated in the divorce decree.

Based on the United States Supreme Court's interpretation of the federal counterpart of section 17081 of the Revenue and Taxation Code, it is our conclusion that the sums which appellant received from her former husband in 1960 were includible in her gross income because her divorce decree did not specifically designate any amounts that were attributable to child support.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Marion A. Gregg

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Marion A. Gregg against a proposed assessment of additional personal income tax and penalty in the total amount of $463.91 for the year 1960 be modified by eliminating the penalty. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 7th day of July, 1967, by the State Board of Equalization.

Paul R. Leake, Chairman

John W. Lynch, Member

Richard Nevins, Member

_____, Member

_____, Member

ATTEST: _____, Secretary